IN THE SUPREME COURT OF OHIO

THE CLEVELAND ELECTRIC ILLUMINATING CO.,	:	Case No. 2020-0277
Plaintiff-Appellant/Cross-Appellee,	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District
vs.	:	Court of Appeals Case No. CA 19-108560
CITY OF CLEVELAND, et al.,	:	
Defendants-Appellees/Cross-Appellants.	:	

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TABLE OF CONTENTS

Page

APPENDIX TABLE OF CONTENTS**:** Appx. Page No.

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REGULATIONS

CONSTITUTIONAL PROVISIONS

I. INTRODUCTION

The material facts in this case are not in dispute: Appellees/Cross-Appellants, the City of Cleveland and Cleveland Public Power (collectively, the "City"), do *not* sell surplus electricity to customers outside of the municipal limits in excess of the 50 percent limitation established by Article XVIII, Section 6, of the Ohio Constitution, and do *not* purchase electricity "*solely* for the purpose of reselling the entire amount of the purchased power to an entity outside of the City's geographic limits" as set forth in *Toledo Edison Co. v. Bryan*, 90 Ohio St. 3d 288, 737 N.E.2d 529 (2000). As a result, the trial court correctly rejected the arguments of FirstEnergy Corp.'s ("FirstEnergy") Ohio electric distribution utility, Appellant/Cross-Appellee, the Cleveland Electric Illuminating Co. ("CEI"), holding that "this is a constitutional provision [at issue] and it cannot be ignored by this Court or the parties in this case." (CEI Appx. at 041).

Significantly, contrary to CEI's arguments, the trial court properly recognized that it is not the role of the courts to change the law created in the Ohio Constitution. (CEI Appx. at 041-042). Thus, the trial court correctly entered judgment as a matter of law for the City. CEI's Merit Brief does not change the foregoing undisputed, and indisputable, material facts that are dispositive of this case, and as such, this Court should reverse the Eighth District Court of Appeals' Decision ("Eighth District's Decision") in its entirety and reinstate judgment as a matter of law in favor of the City.

Under the Eighth District's Decision, every sale and purchase of electricity will be forced into a fact-intensive review by the courts. All the parties agree that it is not beneficial to have the courts inundated with litigation regarding each and every sale and purchase of electricity by a

municipal utility. However, the solution is not to ignore or nullify the constitutional framework, but rather to tether more closely to it.

This Court should also soundly reject CEI's propositions of law that go even beyond the Eighth District's Decision improperly expanding the ruling in *Toledo Edison*. CEI's propositions of law would essentially render Article XVIII, Section 6, of the Ohio Constitution meaningless, destroy Home Rule protections,[1] impact the ability of municipalities to operate efficiently and economically under Article XVIII, Section 4, of the Ohio Constitution, and add new limitations on municipalities, well beyond those articulated in the Ohio Constitution and by this Court. Simply put, CEI's quest to have the judiciary re-write the Ohio Constitution and create new law should be rebuked. Article XVIII, Sections 4 and 6, of the Ohio Constitution are clear and unambiguous and must be applied as written.

Nonetheless, if this Court decides to affirm the Eighth District's Decision and remand this case to the trial court for a factual determination (which would open the door to similar fact-intensive lawsuits), then the entirety of the Eighth District's Decision should be affirmed because it at least upholds the right of municipalities to sell surplus electricity under Section 6 in some circumstances. Because the City must have an energy portfolio that consists of enough resources to supply the maximum amount of electricity that any customer consumes at any given time under any circumstances plus a reserve margin, the Eighth District recognized that, to operate its electric system prudently and cost effectively, the City cannot be required to produce or purchase the precise amount – and only the precise amount – of electricity needed to satisfy the requirements

[1] "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Ohio Const. Article XVIII, Section 3.

of its municipal customers at a particular point in time, and must be allowed to consider cost, risk mitigation, economies of scale, environmental impact, and reliability in its purchasing decisions.

Significantly, CEI complains in its Merit Brief that to allow the City to exercise its Constitutionally protected right to sell electricity to customers outside the municipal bounds subject to the 50 percent limitation would result in unfair competition. This is ironic coming from a utility that is serving 2/3 of the City's customers within the City's boundaries. Additionally, it is CEI (and FirstEnergy), not the City, that have huge economies of scale, financial and political advantages, favorable tax and regulatory treatment, and monopoly/market power over the vast majority of its customers. Indeed, one need look no further than the current debacle regarding Am. Sub. H.B. No. 6 (133rd General Assembly) (July 23, 2019) ("H.B. 6") in Ohio to see the huge financial, political, and power advantages that CEI and FirstEnergy yield in this state. *See State of Ohio v. FirstEnergy Corp., et al.*, Case No. 20-CV-6281 (Franklin Cty. Comm. Pl.); *USA v. Householder et al.*, Case No. 1:20-cr-00077-TSB (S.D. Ohio). Requiring CEI (and FirstEnergy) to comply and be governed by the plain language of the Ohio Constitution is not tantamount to unfair competition. CEI argues that CPP is the largest municipal utility in the state. (CEI's Merit Brief at 1). However, it is undisputed that CPP is only serving electricity to approximately 1/3 of the customers' load within the municipality's boundaries and approximately 3 percent of that amount outside of the municipal boundaries. (Trial Dkt. 96 (4/15/19), Exh. A (Affidavit of John Bentine) at ¶ 37; CEI's Merit Brief at 13). If the largest municipal utility is only operating at those small percentages, then there is not the terrible threat of unfair competition that CEI claims in its Merit Brief. (CEI's Merit Brief at 37-39). In fact, to give this Court a sense of the magnitude of this issue (or lack thereof), "[t]he total of Ohio municipal electric customers, including municipal electric utility customers outside that municipality's corporate limits, only amounts to about 6.8%

of Ohio's total electric customers, with about 7% by electric cooperatives and the balance of 86.2% served by IOUs." (Trial Dkt. 96 (4/15/19), Exh. A, Exh. 1 (Bentine Expert Report) at 17).

In addition to CEI (and FirstEnergy) yielding substantial financial and political power in comparison to the City, CEI's arguments of unfair competition are disingenuous at best. Specifically, it is important to note that CEI wants to be able to compete freely with CPP within the municipal limits of the City and sees nothing wrong with that competition. Yet, CEI does not want any competition at all outside of the municipal limits. So, under CEI's theory, competition inside the municipal limits is totally acceptable and fair, but that is not the case outside. In essence, CEI is asking this Court to allow it to "have its cake and eat it too." This is not equitable and fair, and CEI's arguments do not warrant vitiating Article XVIII, Section 6, of the Ohio Constitution.

Accordingly, for the reasons set forth herein, this Court should reject CEI's Propositions of Law and adopt the City's Proposition of Law, thereby reversing the Eighth District's Decision in its entirety and reinstating judgment as a matter of law in favor of the City.

II. STATEMENT OF THE CASE AND FACTS

A. The Relationship Between CEI and the City

Under Article XVIII, Section 4, of the Ohio Constitution and the Charter of the City of Cleveland, the City has the authority to own, operate, and regulate CPP, and in connection therewith, to acquire property, construct facilities, provide electric energy throughout the service area, and perform other necessary functions to operate and maintain CPP. (Trial Dkt. 59 (10/26/18), Exh. A at 13 (excerpts from City of Cleveland, Ohio Preliminary Official Statement)). Since CPP was established in 1906, consumers in areas served by CPP have had the choice of two electricity providers: CPP and CEI, an electric distribution utility of FirstEnergy. (*Id.* & CEI Appx. at 007). CEI provides electric distribution service to customers in Northeast Ohio, including the City of Cleveland. (*Id.*).

CPP is interconnected with CEI. The City shut down most of CPP's generating units within the City of Cleveland in 1977 and, after a lengthy legal battle with CEI, secured transmission rights across the CEI system, enabling the City to serve its customers primarily through less costly purchased power contracts with other municipalities and suppliers. (Trial Dkt. 59 (10/26/18), Exh. A at 14). Today, the City serves over 73,000 customers primarily through wholesale power purchases and interests in several generating plants through its membership in American Municipal Power, Inc. ("AMP"), a nonprofit corporation comprised of municipal utilities in Ohio and eight other states. (*Id*.).

Prior to deregulation of the industry, the City and CEI both provided bundled distribution, generation, and transmission service through separate distribution and transmission systems. (Trial Dkt. 59 (10/26/18), Exh. A at 31). However, with the implementation of deregulation in Ohio, effective January 1, 2001, the investor-owned electric utilities ("IOUs") in Ohio, such as CEI, were treated differently from the utilities owned by municipalities. The IOUs retained their rights to provide distribution service within their certified territories, but generation became a competitive retail electric service that competitive retail electric suppliers could sell to the IOUs' customers using the local IOU's distribution facilities to deliver the power. (*Id.*). After a transition period, the regulated IOUs were no longer authorized to own generation and transmission assets. *In the Matter of the Commission's Investigation of Ohio's Retail Elec. Serv. Mkt.*, Pub. Util. Comm. No 12-3151-EL-COI, 2012 WL 6641396, Entry at *1 (Dec. 12, 2012) ("Electric utilities in Ohio are now required to separate their charges into distribution, transmission and generation portions, entering into a phase known as the market development period. The market development period from 2001 to 2005 was intended as a transition period…."). CEI is a regulated, distribution-only utility that no longer owns generation or transmission assets and does not compete in the sale

of energy (kwhs). Its FirstEnergy affiliates continue to own generation facilities, which are largely composed of older coal-fired and nuclear plants that have struggled to compete in the PJM Interconnection, L.L.C. ("PJM") wholesale electricity market against newer generation resources, which include more efficient gas fired plants and renewable energy from wind turbine farms. (Trial Dkt. 59 (10/26/18), Exh. A at 31).

In the electric industry today, electric utility service is much more complex than ever before. In the organized markets such as PJM where both CEI and CPP operate (as well as the rest of Ohio), the products and services that make up electric service are, among other items, capacity, energy, losses, transmission service and transformation. On the retail level, transmission (including transformation), distribution service, and billing and metering are provided and billed to customers. Each of those services are affected to some degree by economies of scale. Among other electric service components, the Ohio Revised Code recognizes generation, transmission, distribution metering and billing as separate products and services. (Trial Dkt. 96 (4/15/19), Exh. A, Exh. 1 (Bentine Expert Report) at 8-9).

On the other hand, the City continues to provide bundled distribution, generation, and transmission electric services through its own distribution and transmission systems. The City's generation supply portfolio is comprised of resources that provide reliable and competitively-priced *capacity and energy* to its customers. It consists of a diverse mix of resources, including new, state of the art coal-fired, natural gas-fueled, hydroelectric, bioenergy, solar, and wind generation. (Trial Dkt. 59 (10/26/18), Exh. A at 22). The City has committed to these generation resources and generation projects in order to: (i) secure long-term stable sources of power; (ii) explore local generation opportunities where transmission congestion costs are mostly avoided;

(iii) mitigate the costs of meeting its resource adequacy obligations; and (iv) diversify its generation supply portfolio and increase its supply of renewable energy. (*Id.* at 22-23).

In 2017, about 20 percent of CPP's energy was supplied from renewable sources. The City has voluntarily pursued renewable goals, which continue to be consistent with the state-mandated Renewable Portfolio Standard ("RPS") targets applicable to Ohio's IOUs (albeit those have now been reduced by the recent enactment of H.B. 6). (Trial Dkt. 59 (10/26/18), Exh. A at 22-23). One of these projects is called the Brooklyn Solar project, which is located in Brooklyn, Ohio with a connection to the City's distribution system. (*Id.* at 24). Contrary to CEI's claim, the record evidence demonstrates that all of the electricity generated by the Brooklyn Solar project is provided by the City to buildings owned by Cuyahoga County located within the City's municipal boundaries. (*Id.*). The local Brooklyn Solar project will also provide additional capacity to help the City become more energy independent and to diversify its supply portfolio.

The City's generation supply portfolio also consists of a variety of market energy purchases of various quantities and terms from a variety of wholesale market-based suppliers. (Trial Dkt. 59 (10/26/18), Exh. A at 24). These market purchases are often referred to as "block power" purchases. Residents within the City's municipal boundaries can and do switch between CPP and CEI. (*Id.* at 32). And, at any given time, the City needs to be prepared to and have access to serve all of its customers with a sufficient amount of electricity (energy and capacity) to fulfill their electricity needs plus a reserve margin. (Trial Dkt. 96 (4/15/19), Exh. A (Affidavit of John Bentine) at ¶¶ 12, 31).

For years, the City has remained competitive with CEI, despite CEI's (and FirstEnergy's) huge economies of scale, financial and political advantages, favorable tax and regulatory treatment, and monopoly/market power status over the vast majority of its customers. (Trial Dkt.

96 (4/15/19), Exh. A, Exh. 1 at 34); *see also* H.B. 6; *State of Ohio v. FirstEnergy Corp., et al.*, Case No. 20-CV-09-6281 (Franklin Cty. Comm. Pl.); *USA v. Householder et al.*, Case No. 1:20-cr-00077-TSB (S.D. Ohio). Presently, the City only serves approximately thirty-five percent of customers within the municipal limits of the City of Cleveland. (Trial Dkt. 96 (4/15/19), Exh. A, Exh. 1 at 22).

B. The Institution of this Litigation by CEI, and CEI's Attempt to Use Litigation to Impair the City's Operations and Thwart Competition

As the City has continued to compete successfully against CEI, CEI and FirstEnergy have resorted to litigation in an attempt to impair the City's operations. Specifically, on May 9, 2018, CEI filed a Complaint For Temporary Restraining Order And Preliminary Injunction against the City in this case. (CEI Appx. at 011; Trial Dkt. 1 (5/9/18) (Complaint)). In the Complaint, CEI alleged that CPP had "begun affixing equipment to CEI's active power lines and placing CPP's new wires on top of – and in physical contact with – CEI's existing energized conductor lines." (*Id.*). CEI sought injunctive relief for trespass, negligence and negligence *per se*, and public and private nuisance. (*Id.*). On May 15, 2018, six days later, the parties reached a settlement relating to the temporary restraining order. (*Id.*). The trial court retained jurisdiction. Having resolved the construction dispute with the City, CEI was forced to find a new way to thwart the City's lawful business of providing electric service to customers who affirmatively choose the City over CEI. On July 2, 2018, nearly seven weeks after settling the original dispute, CEI filed a First Amended Complaint For Declaratory Judgment And Preliminary And Permanent Injunctions (the "Amended Complaint"), which introduced dramatically new allegations. (Trial Dkt. 15 (7/2/18)). Whereas the initial Complaint focused on the City's construction activities in Brooklyn, the Amended Complaint took direct aim at the City's business activities. Specifically, CEI alleged that the City "unlawfully sell[s] electricity to CEI's customers in the City of Brooklyn ('Brooklyn') and other

locations outside Cleveland's municipal limits in contravention of the Ohio Constitution, Article XVIII, §§ 4 & 6, and the Certified Territories Act, Ohio Rev. Code § 4933.81 *et seq.* ('CTA')." (*Id.* at ¶ 1). In so alleging, however, CEI ignored that the City, like all Ohio municipal utilities, operates in a "proprietary" capacity and is even entitled to a "reasonable profit." *See Niles v. Union Ice Corp*. 133 Ohio St. 169, 181, 12 N.E.2d 483 (1938); *Orr Felt v. Piqua*, 2 Ohio St. 3d 166, 443 N.E.2d 521 (1983). This means that although operated by the municipality, the utility can operate as a business.

Nonetheless, CEI asserted three claims in its Amended Complaint: Declaratory Judgment; Tortious Interference With Contract And Business Relations; and Unfair Competition. (Trial Dkt. 15 (7/2/18) at ¶¶ 40-61). All of CEI's alleged new claims relied on a single, faulty premise—that the Ohio Constitution prohibits the sale of any artificial surplus electricity by the City. CEI asked the trial court to "declare that [the City's] sale of electricity to Brooklyn, the inhabitants of Brooklyn, and all other extraterritorial sales derived from its artificial surplus are unconstitutional…." (*Id.* at ¶ 45). And, under CEI's theory, *any* surplus whatsoever should be deemed artificial surplus. However, not only does the Ohio Constitution affirmatively permit the sale of some surplus electricity by municipalities, and despite the ample discovery at the trial level in this case, CEI could *not* produce one single piece of record evidence to support its factual arguments as to what it deemed an unlawful sale of an "artificial" surplus.

To the contrary, Ohio law expressly authorizes municipal utilities to sell surplus electricity to extraterritorial customers, subject to two restrictions—that the surplus may not exceed 50 percent of the total product or service sold within the municipality, and that the municipal utility may not engage in brokering, that is, purchasing additional electricity with the purpose of reselling

the entire purchased amount outside of its municipal boundaries.[2] Uncontroverted and undisputed record evidence demonstrates that the City complied with both provisions. First, CEI admitted the City sells surplus electricity to customers outside of municipal limits well below the 50 percent limitation set by the Ohio Constitution, and does not dispute the City's evidence regarding that fact. (CEI's Merit Brief at 12; *see also* Trial Dkt. 96 (4/15/19), Exh. A (Affidavit of John Bentine) at ¶ 19 ("Nonetheless, when considering kWhs, CPP's outside sales in 2015-2017 of less than 3.3% per year are nowhere near 50%.")). Second, CEI does not dispute that the City does not purchase electricity "solely for the purpose of reselling the entire amount of the purchased power to an entity outside of the City's geographic limits." (Trial Dkt. 59 (10/26/18), Exh. C (Affidavit of Chris Williams) at ¶ 4). Indeed, the only record evidence on this issue was presented by the City's Rule 30(b)(6) witness, Chris Williams. While CEI refers to multiple purchase contracts into which the City has entered, it is significant that nowhere do those contracts provide that the City entered into those contracts solely for the purpose of reselling the purchased power to an entity outside of the City's geographic limits. And CEI does not contend otherwise. It cannot because the City does not purchase electricity solely to resell the purchased power outside of its geographic limits. The factual inquiry should end there.

C. The Trial Court's Decision Correctly Applying the Ohio Constitution and Enforcing This Court's Precedent

Following discovery, the City filed its Motion for Summary Judgment, arguing that the City's extraterritorial provision of electric service does not violate Article XVIII, Sections 4 and 6, of the Ohio Constitution. (CEI Appx. at 014). On December 4, 2018, after several recusals by

[2] *See* Part III, below.

judges in Cuyahoga County, this Court assigned the case to Retired Judge Robert C. Pollex, a judge with over 32 years of experience on the bench.

On May 10, 2019, Judge Pollex issued his Judgment, granting summary judgment to the City. (CEI Appx. at 032-048). In his well-reasoned, 17-page decision, Judge Pollex correctly recognized that "[t]he primary issue in this case centers on the definition of *surplus* in view of the facts of this case." (CEI Appx. at 032). After accurately summarizing the parties' arguments, and confirming that "the most significant case precedent as to the facts and issues in this case is *Toledo Edison v. City of Bryan*, 90 Ohio St.3d 288 (2000)," Judge Pollex found that "there are really no significant differences in the factual data as to the essential issue in this case, that is *surplus*," so "this case can be resolved by summary judgment." (CEI Appx. at 033-037).

In applying the law to the facts of this case, Judge Pollex correctly recognized that, despite CEI's arguments to the contrary, "this is a constitutional provision [at issue] and it cannot be ignored by this Court or the parties in this case." (CEI Appx. at 041). Judge Pollex continued:

> *It is not the role of the trial court at this level to change the law, particularly one created in the Ohio Constitution.* The Court is not in a position to rule on the validity or irrelevance of the 50% limitation imposed in [the] Ohio Constitution. *The Court does have concerns like the Plaintiff, but there is no evidence that show that the acts of the Defendants do violate either the Ohio Constitution or the Toledo v. Bryan case established by the Ohio Supreme Court.* The Court does not find a brokering situation or an abuse of the competitive processes by the establishment of this project, as alleged by the Plaintiff. *[The] Court will restrict its decision to the actual facts in this case without attempting to change public policy as to the constitutional limitation.*

(Emphasis added.) (*Id.* at 041-042). The Court observed that "*CEI has failed to identify any relevant factual allegations that are in conflict, or to set forth any specific facts showing that there is a genuine issue for trial.*" (Emphasis added.) (*Id.* at 045). "While CEI spends nearly the entirety of its brief discussing 'factual' issues, the 'facts' identified by CEI are either (i) not

relevant to this case, [or] (ii) [] not in dispute." (*Id.*). Most significantly, Judge Pollex decided that:

> The Court's summary judgment determination should be driven exclusively by the law on the two relevant issues in this case:
>
> (1) whether Defendants have exceeded the fifty percent (50%) limitation set by Article XVIII, Section 6, of the Ohio Constitution in selling or agreeing to sell service or products to the city of Brooklyn and/or other entities outside the municipal boundaries and
>
> (2) whether Defendants have purchased "electricity solely for the purpose of reselling the entire amount of the purchased electricity to an entity outside the municipality's geographic limits," *see Toledo Edison*, 90 Ohio St.3d at 282 (emphasis added), in selling or agreeing to sell electric service to the city of Brooklyn and/or other entities.

(Underline sic.) (*Id*. at 045-046). Against this backdrop, Judge Pollex found "*it is abundantly clear that the Plaintiff has failed to establish the existence of a genuine issue of material fact in support of its claims.*" (Emphasis added.) (*Id.* at 046). As a result, the trial court granted summary judgment to the City on CEI's claims. (*Id.* at 046, 048). Because the trial court correctly applied the law to the facts of this case, this Court should re-instate the trial court's Judgment.

D. The Eighth District's Decision Improperly Creating New Law by Extending the *Toledo Edison* Holding

After Summary Judgment was granted in favor of the City, CEI appealed the case to the Eighth District. The Eighth District reversed the trial court decision and remanded the case for a further factual determination: whether the City purchased the electricity solely for the purpose of resale to outside customers. (CEI Appx. at 029-030). The Eighth District differed from the trial court on one key issue: it held that the *Toledo Edison* case precluded a municipality from purchasing *any amount* of electricity solely for the purpose of resale to customers outside the municipality's boundaries. (*Id*. at 025-026). The trial court had held that *Toledo Edison* precluded

such sales only when the *entire amount* purchased was for resale to outside customers. (*Id*.). However, the Eighth District held that sales were precluded when any amount was purchased *solely* for the purpose of resale to customers outside the municipality's boundaries (and further explained that other purposes could exist for purchasing the power). (*Id*. at 026). That conclusion, while erroneous, would nonetheless preclude CEI's baseless constitutional claims. As the Eighth District recognized:

> [W]e do not agree with CEI's assertion that any surplus electricity CPP possesses can only be an "artificial surplus," i.e., "an amount acquired only so it could be resold outside Cleveland's boundaries." As stated above, we do not read the Ohio Constitution and *Toledo Edison* as requiring a municipality to produce or purchase the precise amount – and only the precise amount – of electricity needed to satisfy the requirements of its municipal customers. What Sections 4 and 6 aim to avoid is "unfettered authority" by municipalities "to purchase and resell electricity to entities outside their boundaries" so as to "create unfair competition for the heavily regulated public utilities." *Toledo Edison* at 293. A city is not required to forego considerations such as cost, risk mitigation, economies of scale, environmental impact and reliability in favor of purchasing only the precise amount of electricity required for use by customers within the municipality at any given time.
> * * * *
> [I]t is only where a city purchases excess electricity *solely* for the purpose of selling it outside city limits or otherwise exceeds the 50 percent limitation that the city violates the Ohio Constitution.

(Emphasis sic.) (CEI Appx. at 028-029). Thus, even if the Eighth District's interpretation of the law is correct, the City would still be entitled to judgment as a matter of law because there is no record evidence, and CEI has not identified any in this appeal, to establish that the City purchased excess electricity solely for the purpose of reselling it outside the city limits or exceeded the 50 percent limitation of the Ohio Constitution. Facing defeat on remand, CEI appealed to this Court.

E. CEI's Inaccurate and Misleading Assertions about the Wholesale Electricity Market

CEI's Merit Brief dedicates a significant number of pages to factual assertions and arguments that are either inaccurate or not in dispute. Perhaps most significantly, CEI presents an

intentionally-misleading portrayal of the wholesale electricity market and the market realities that create surpluses. CEI attempts to create factual disputes where none exist.

CEI attempts to portray the electric market as a rapidly-traded marketplace in which utilities are buying and selling electricity by the second to perfectly match the exact electricity consumed by their customers at any given second of the day or night. CEI's Merit Brief states the following:

- Page 8: "Buying and selling electricity in real time made utilities more efficient, coordinated, and reliable. [Regional Transmission Authorities] allow utilities to precisely match supply and demand, saving consumers billions of dollars each year."

- Page 8: "Indeed, 'very few Ohio municipal systems' rely on generation facilities owned and operated by the municipality 'without market purchases.'"

- Page 9: "Critically, PJM [the Regional Transmission Authority to which the City belongs] enables utilities to purchase the exact amount of electricity their customers use….The inefficiencies caused by local generation and long-term contracts are a thing of the past."

- Page 11: "Today, however, those wholesale markets enable municipal utilities to purchase electricity in virtually unlimited amounts, allowing them to effortlessly create artificial surpluses of any size."

These statements provide an inaccurate description of the wholesale electricity market and focus on the wholesale energy spot market operated by the regional transmission operator, PJM. But the statements ignore the multiple markets operated by PJM and the various services and products it offers. First, the wholesale electricity market, and therefore, related surplus, cannot be measured simply in terms of kilowatt hours consumed. The various individual services and products required and provided to consumers as part of their overall electric service also includes generation capacity, interconnection capacity, transmission and distribution system capacity, transformation and metering. (Trial Dkt. 96 (4/15/19), Exh. A (Affidavit of John Bentine) at ¶ 23, *see also* Trial Dkt. 96 (4/15/19), Exh. A, Exh. 1 (Bentine Expert Report) at 25). CEI conveniently

focuses solely on energy, as measured in kilowatt hours, to the exclusion of other products and services. However, since the City provides all these related services and products to its customers, tailoring the exact amount of kilowatt hours to the actual amount of demand consumed by consumers is not nearly as simple as CEI (the distribution only company) suggests. For example, the City is required to maintain a capacity reserve margin of 13 to 15 percent, which is in addition to the capacity needed to serve the City's existing customer peak load. (Trial Dkt. 96 (4/15/19), Exh. A at ¶ 12). The assets required to meet *capacity* requirements of CPP's existing customers can result in a surplus of *energy* far beyond what the City currently sells to outside customers. (*Id*. at ¶ 31).

Second, while most municipal entities do not directly own a large portfolio of generation assets, the City is a member of AMP, a non-profit, municipal power agency with over 130 municipal members that operate municipal electric systems. (*Id*. at ¶¶ 5-6). On behalf of its members, including the City, AMP owns and/or operates hydroelectric, wind, solar, state of the art coal-fired, natural gas, and diesel generation as well as transmission facilities. (*Id*.). As a member of AMP, the City has contracted generating resources with other municipalities through AMP. The City's external and internal generating resources relieve the City from having to procure the corresponding amount of capacity in PJM's capacity market, allowing the City to avoid relying solely on the variable pricing of the PJM capacity market. Further, under this market construct (and contrary to what CEI would lead this Court to believe), the City is not permitted to sell energy from its internal generating resources into PJM's wholesale electric markets.

Third, long-term energy contracts are not "a thing of the past" and provide quantifiable benefits over hypothetical real-time purchases. The City purchases electricity through a "portfolio approach" that includes a mixture of spot, medium, and long-term market purchases, as well as

long-term obligation purchases, from a variety of generation sources, including renewable sources. (Trial Dkt. 96 (4/15/19), Exh. A at ¶ 24). This approach allows the City to mitigate long-term risk by acquiring cost-based supply not subject to market variations, while also meeting renewable energy objectives. (*Id.*). For example, CEI attempts to suggest that the relatively small size of several contracts indicates that the City purchased the electricity for brokerage purposes. (*See* CEI's Merit Brief at 28-29). However, the report cited does not indicate any earmarking of these contracts for customers outside of the City's boundaries, and instead shows that the contracts provide the City with stable five and ten-year commitments for energy generated from wind turbines. (*See* Trial Dkt. 90 (3/13/19), Exh. C at 2 (noting that the Morgan Stanley contracts are for 2015-2019 and 2010-2019)).

CEI's misrepresentation of the wholesale electricity market and simplistic view of what electric purchases are needed to exactly match the municipality's customers' demand for electricity at any given point in time would force the City to make up any electricity supply shortfalls with spot market purchases, which would unnecessarily expose the City and its customers to excessive costs and risks. Such a result would not allow the City to operate its municipal electric system in a cost-effective manner, jeopardizing the City's very ability to operate one at all. The exact outcome that CEI and the IOU amici are hoping for—eliminate the municipal electric companies and eliminate the IOUs' competitors.

CEI's misrepresentation of the wholesale electricity market also does not change the undisputed and indisputable facts: (1) the City has not exceeded the 50 percent limitation set by Article XVIII, Section 6, of the Ohio Constitution in selling or agreeing to sell service or products to the city of Brooklyn and/or other entities outside the municipal boundaries; and (2) the City has not purchased electricity *solely* for the purpose of reselling it to an entity outside the municipality's

geographic limits. As such, the City is entitled to have the Eighth District's Decision reversed and the trial court's Judgment as a matter of law in favor of the City reinstated.

III. ARGUMENT IN RESPONSE TO CEI'S PROPOSITIONS OF LAW

In its Appeal, CEI correctly states that the parties to this litigation agree that Article XVIII, Sections 4 and 6, of the Ohio Constitution "read together, enable and constrain CPP's participation in the electricity market." (CEI's Merit Brief at 4). CEI also states that municipal utilities must adapt to market changes "within clear constitutional guardrails." (CEI's Merit Brief at 5). However, CEI's propositions of law not only veer outside of those constitutional guardrails, they vitiate one in its entirety – essentially requesting that a crucial piece of the Ohio Constitution be ignored or improperly nullified. As the trial court recognized, CEI simply cannot have the Ohio Constitution rewritten by the courts of Ohio. As a result, CEI's Propositions of Law should be rejected.

A. CEI's Propositions of Law Nos. 1 and 2 Seek to Introduce a Novel Avoidance Requirement that Is Not Only Absent from Article XVIII, Sections 4 and 6, of the Ohio Constitution, But Is Actually Antithetical to the Language of Section 6

CEI's Propositions of Law Nos. 1 and 2 both seek to require a municipality to avoid purchasing a surplus of electricity when possible:

> CEI's Proposition of Law No. 1: A municipal utility violates Article XVIII, Sections 4 and 6 if it sells electricity outside municipal boundaries from an artificial surplus, including any avoidable excess electricity a municipality purchases that was not to supply the city or its inhabitants.
>
> CEI's Proposition of Law No. 2: A municipal utility violates Article XVIII, Sections 4 and 6 if it can buy only the amount of electricity needed within the city, but instead it buys excess electricity and sells electricity outside municipal boundaries.

In other words, both propositions improperly suggest that a municipality violates Article XVIII, Sections 4 and 6, of the Ohio Constitution if: (a) it could avoid buying more electricity than it

needs to supply the municipality or its inhabitants but does so anyway, and (b) it sells that surplus electricity outside the municipal boundaries. Contrary to CEI's propositions, Article XVIII, Sections 4 and 6, of the Ohio Constitution include *no requirement to avoid a surplus*, and Section 6 *explicitly permits* municipalities to sell surplus electricity outside the municipal boundaries "in an amount not exceeding . . . fifty per cent of the total service or product supplied by such utility within the municipality." This Court's interpretation of Article XVIII, Sections 4 and 6, of the Ohio Constitution in *Toledo Edison Co. v. Bryan*, 90 Ohio St. 3d 288, 292, 737 N.E.2d 529 (2000), which held that certain purchases of surplus were prohibited, does not even hint at an affirmative duty for municipalities to avoid purchasing any surplus. Indeed, a requirement upon municipalities to avoid a surplus when possible would have prohibited the very arrangements that the framers of the Constitution sought to allow. Furthermore, a requirement of that type would essentially void Article XVIII, Section 6, of the Ohio Constitution altogether.

Moreover, this Court has recognized that Ohio municipal utilities operate in a "proprietary" capacity and are even entitled to a "reasonable profit." *See Niles v. Union Ice Corp.* 133 Ohio St. 169, 12 N.E.2d 483 (1938); *Orr Felt v. Piqua,* 2 Ohio St. 3d 166, 443 N.E.2d 512 (1983). This means that although operated by the City, CPP can operate as a business. As such, the City can and should make rationale, cost justified extensions of service inside and outside the City to contribute to its ability to achieve those goals, being mindful of the environment, securing economies of scale, mitigating risks, and lowering the cost of service to its inhabitants. (See Trial Dkt. 96 (4/15/19), Exh. A, Exh. 1 (Bentine Expert Report) at 29).

Thus, contrary to CEI's contentions, any surplus whatsoever cannot as a matter of law and fact be deemed an "artificial" surplus. As a result, CEI's Propositions of Law Nos. 1 and 2 must be rejected.

1. Nothing in Article XVIII, Sections 4 and 6, of the Ohio Constitution Impose a Requirement that Municipalities Avoid a Surplus When Possible

Legal analysis begins with the text, which in this case is the Ohio Constitution, Article XVIII, Sections 4 and 6. The Ohio Constitution "controls as written unless changed by the people themselves . . . . the framers chose its language carefully and deliberately, employed words in their natural sense, and intended what they said." *City of Cleveland v. State*, 157 Ohio St.3d 330, 2019-Ohio-3820, 136 N.E.3d 466, ¶ 16, *reconsideration denied sub nom. Cleveland v. State*, 157 Ohio St.3d 1520, 2019-Ohio-5289, 136 N.E.3d 526. Article XVIII, Sections 4 and 6, of the Ohio Constitution authorize municipalities to operate public utilities that supply the municipality or its inhabitants and limit the amount of sales that may be made outside the municipality:

> (4) Any municipality may . . . operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. . . .
>
> * * *
>
> (6) Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, *may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per cent of the total service or product supplied by such utility within the municipality. . . .*

(Emphasis added.) Ohio Const., Art. XVIII, §§ 4 and 6.

The Ohio Constitution, on its face, permits municipalities to have and sell surplus product. Indeed, this Court stated: "The Ohio Constitution provides that municipalities may acquire or produce utility services or products for the municipality and its inhabitants and sell surplus product or service." *Toledo Edison*, 90 Ohio St. 3d at 291 (citing Article XVIII, Sections 4 and 6, of the Ohio Constitution). This Court has also held that the meaning of "surplus" in Section 6 is clear

and means "the amount that remains when use or need is satisfied." *Toledo Edison*, 90 Ohio St. 3d at 292.[3] As a result, there is no question that Section 6 anticipates that municipalities will acquire more electricity than used or needed within the boundaries of the municipality, and that municipalities will sell the amount that remains when the use or need within the municipality is satisfied. Nothing in Section 4 or Section 6 places a burden on the municipality to avoid obtaining *any* surplus or to refrain from selling *any* surplus electricity. Indeed, the plain language of Section 6 permits municipalities to acquire and sell not just a *de minimus* amount of surplus, but *up to half* as much surplus electricity as the total it supplies within the boundaries of the municipality.

Within the 50 percent limit set forth in Section 6, a municipality has discretion to purchase electricity, even electricity that becomes surplus, in order to further its primary purpose of supplying electricity within the boundaries of the municipality. This Court's decision in *Toledo Edison Co. v. Bryan* neither eliminated this discretion nor imposed any burden on the municipalities to match the exact amount needed to satisfy its customers' demand at any given point in time and avoid purchasing any electricity that may become a surplus after that need is met. Rather, the Court considered "whether a municipality has constitutional authority to purchase electricity *solely* for direct resale to an entity that is not an inhabitant of the municipality and not within the municipality's limits." (Emphasis added). (*Id.* at 291). The Court carefully limited its holding to that specific circumstance, repeating the word "solely" with important effect:

Thus, we hold that Sections 4 and 6 of Article XVIII of the Ohio Constitution, read

[3] While CEI wants this Court to focus only on energy surplus, as measured in kilowatt hours, there are multiple other services and products required and provided to consumers as part of their overall electric service, including generation capacity, interconnection capacity, transmission and distribution capacity, transformation and metering. The City should be able to maximize these other surplus capacities in furtherance of its primary purpose and in acting in its proprietary capacity. So, the determination of surplus is not as simple as CEI suggests. (Trial Dkt. 96 (4/15/19), Exh. A (Affidavit of John Bentine) at ¶ 23, *see also* Trial Dkt. 96 (4/15/19), Exh. A, Exh. 1 (Bentine Expert Report) at 25).

> *in pari* material, preclude a municipality from purchasing electricity *solely* for the purpose of reselling it to an entity that is not within the municipality's geographic limits. . . . [This precludes situations] where a municipality purchases electricity *solely* to create an artificial surplus for the purpose of selling the electricity to an entity not within the municipality's geographic boundaries.

(Emphasis added). (*Id.* at 293). *Toledo Edison* prohibits transactions that are "solely" for the purpose of creating a surplus to resell outside of the municipality and expressed a concern about a municipality becoming a broker. If a municipality enters a contract for the purchase of electricity, and if some of that electricity is going to be used within the municipality, that contract is not *solely* for the purpose of reselling it and the municipality is not acting as a broker. Here, there is no record evidence whatsoever that the City made purchases solely for the purpose of reselling all of the purchased electricity outside the boundaries of the municipality.[4] So, instead, CEI wishes to read a prohibition on all transactions that create any avoidable surplus, effectively making it impossible for there to be any surplus at all. However, no such prohibition exists in Sections 4 or 6 or in *Toledo Edison*'s interpretation of those Sections.

Moreover, the cases cited by CEI in its Merit Brief do not change this outcome (and are really not relevant here). CEI cites to *State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 159 N.E.2d 741 (1959) for the proposition that municipalities have limited power to sell outside their city limits. (CEI's Merit Brief at 21). That case addressed whether it was unlawful for the municipality to sell *more than 50 percent* of the total amount of electricity supplied within the municipality to

[4] The trial court held that "CEI has failed to identify any relevant factual allegations that are in conflict" and specifically noted that regarding the facts submitted by the City that the City does not purchase electricity solely for the purpose of reselling the entire amount of the purchased electricity to an entity outside the municipality's geographic limits "CEI does not offer any evidence to contradict the city." (CEI Appx. at 045). The Eighth District, though finding disputes of fact as to whether *any* amount of surplus was for the purpose of reselling, does not contradict the trial court's finding that there was no evidence of the City making purchases solely for the purpose of reselling the entire amount of the purchased electricity outside of its boundaries. (CEI Appx. at 028).

an entity that then sold the electricity to be consumed outside of the city's corporate limits. *State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 464, 159 N.E.2d 741, 745 (1959) (holding that a contract violated that Ohio Constitution "in that it contemplates the sale for use and consumption by noninhabitants of the municipality of more than 50 per cent of the product (electricity) supplied to inhabitants thereof by a municipally owned public utility (electric power plant)."). The Court was enforcing the 50 percent limit articulated in Section 6 and did nothing to place additional burdens on municipalities to avoid any amount of surplus. Here, it is undisputed that, with the City selling only approximately 3 percent outside of its municipal limits, the 50 percent limitation is not anywhere close to being violated.

Likewise, CEI also cites to *Britt v. City of Columbus*, 38 Ohio St. 2d 1, 309 N.E.2d 412 (1974) for the proposition that municipalities have limited power to sell outside their city limits. (CEI's Merit Brief at 22). However, that case addressed whether municipalities have the power of eminent domain outside of their boundaries. *Britt v. City of Columbus*, 38 Ohio St. 2d 1, 11, 309 N.E.2d 412, 418 (1974) (holding that "Sections 3, 4 and 6 of Article XVIII do not confer any constitutional power of eminent domain for the purpose here sought . . . ."). In addressing that unrelated question, the Court did nothing to place additional burdens on municipalities to avoid any amount of surplus. The last case cited by CEI in support of these Propositions of Law, *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St. 3d 521, 668 N.E.2d 889 (1996), is also irrelevant and does not support a new duty to avoid any surplus. Furthermore, the key argument that CEI makes by citing to these cases is that "[i]mplied powers under Article XVIII may not be created by judicial extrapolation." (CEI's Merit Brief at 23). The City here is not relying on implied powers but *express* powers – the power to sell surplus electricity within the 50 percent limit articulated in Section 6. It is CEI who seeks to read something unwritten into Sections

4 and 6 and have this Court create by "judicial extrapolation" of the Ohio Constitution, which is not permissible here.

2. The Framers Intended to Permit Municipalities to Sell Surpluses in Order to Finance Their Ability to Supply Themselves and Their Residents

As CEI concedes, the "primary goal of the Home Rule Amendment [Article XVIII of the Ohio Constitution] framers" in 1912 was to encourage the construction and ownership of utility systems, which meant "mitigating the capital risk attendant to entering the utility business." (CEI's Merit Brief at 5). According to the framers, acquiring a surplus of electricity (which CEI would characterize as an "artificial surplus" because it was intentionally generated to exceed the amount needed for the municipality and its residents) for the immediate purpose of generating capital was for the greater purpose of facilitating the municipality's ability to supply its residents satisfies the primary goal of Home Rule. Specifically, CEI's Merit Brief acknowledges:

> The framers endowed each municipal utility with the right to sell excess electricity – power that it generated with new facilities but did not currently need to serve inhabitants. The associated revenue from customers outside the city, during the years when generated power exceeded in-city demand, would allay the substantial capital investment required to develop or acquire by condemnation a complete municipal utility.

(CEI's Merit Brief at 5-6). To ensure that the supply of the municipality and its residents remained the primary purpose, "the framers enacted Article XVIII, Section 6, which allows municipalities to sell 'surplus product' outside the city, but caps the amount at 'fifty percent of the total service of product supplied by the utility within the municipality.'" (*Id.* at 6).

In accordance with the framers' intent, municipalities are permitted to acquire and sell a surplus of electricity up to the 50 percent limit in Section 6. The limited prohibition articulated in *Toledo Edison* would have permitted municipalities in 1912 to generate a surplus in any given facility that also supplied its residents, and only prohibited the creation of a facility that was created

solely for the purpose of generating electricity to be sold outside the municipality. As a result, under the framers' intent and under *Toledo Edison*, a municipality can obtain a surplus and sell the surplus, as long as it does not enter into transactions that are solely for the purpose of acquiring electricity that will be sold outside the municipality.

In contrast, CEI's Propositions of Law Nos. 1 and 2 seek to preclude even the original intent of the framers, which was to create a surplus (*i.e.*, to intentionally generate more electricity than could be used to supply the municipality and its residents) for the purpose of selling that surplus to raise money to support its primary purpose. CEI tries to parse that by arguing that the surplus was unavoidable, by which, in that instance, CEI would mean financially necessary. That would raise another set of factual questions about whether the income from certain sales of surplus electricity was financially necessary, but more to the point there is nothing in the language of Sections 4 or 6 or even in *Toledo Edison* that prohibits any avoidable surplus, and nothing that suggests that Section 4 and 6 intend for a distinction between avoidable and unavoidable surpluses to be drawn. The Ohio Constitution expressly permits the City to sell its surplus up to the 50 percent limitation. Period.

3. CEI's Propositions of Law Nos. 1 and 2 Must Be Rejected Because They Would Vitiate Article XVIII, Section 6 of the Ohio Constitution

CEI's Propositions of Law Nos. 1 and 2 articulate a burden that was *not* in the text of Article XVIII, was *not* part of the framers' intent, and was *not* contemplated by this Court: a burden of avoiding any avoidable purchase of excess electricity. CEI argues that under the current electric framework, there is no need for the municipality to ever buy excess electricity. (CEI's Merit Brief at 27). In addition to being factually inaccurate (as discussed further in the section that follows), CEI's argument is untenable as a matter of law. CEI argues that, because municipalities can purchase energy on an hourly basis, any other type of purchase that results in a surplus – even

down to the hour – should be *per se* unconstitutional. This would effectively repeal Section 6 and strip municipalities of the right to acquire and sell a surplus within constitutional limits.

Nothing in the Court's decision in *Toledo Edison* violated Section 6 – to the contrary, it confirmed that the Ohio Constitution provides municipalities with "the right to sell limited amounts of surplus electricity to entities outside the geographic boundaries of the municipality." *Toledo Edison*, 90 Ohio St.3d at 288. CEI's first and second propositions of law call upon this Court to repeal that constitutional right, but it may not appeal to the judiciary to amend the Ohio Constitution, because the judiciary has sworn to uphold the same. *City of Rocky River v. State Employment Relations Bd.*, 43 Ohio St. 3d 1, 7, 539 N.E.2d 103, 108 (1989) (quoting Section 7, Article XV of the Ohio Constitution). Rather, to achieve the result CEI seeks, it would need a constitutional amendment repealing Article XVIII, Section 6, of the Ohio Constitution.

Furthermore, attacking the foundational rights of municipalities would have a cascading effect. Removing the right to sell surplus electricity outside the boundaries of the municipality that was granted in Section 6 would render meaningless the statutes resting upon that constitutional framework, including Ohio Rev. Code §§ 743.12, 743.13, and 743.18, which provide a statutory right for a municipality to sell to customers located outside the municipal boundaries who have expressly requested service from the City.

As a result, CEI's Propositions of Law Nos. 1 and 2 have no basis in Article XVIII, Sections 4 and 6, of the Ohio Constitution as interpreted by this Court, directly contradict the intent of the drafters, and, if accepted, would effectively write Section 6 out of the Ohio Constitution. Thus, these propositions of law should be rejected.

B. CEI's Propositions of Law Nos. 1 and 2 Are Based on Fiction

In addition to being unconstitutional, CEI's Propositions of Law Nos. 1 and 2 are propped

up by the fiction that utilities do not need to acquire or sell *any* surplus. This is belied by CEI's own explanation, which suggests that the City can avoid having a surplus by simply *selling* the purportedly non-extant surplus ("excess power") to wholesale markets:

> CPP has no constitutionally authorized reason to buy or resell any extra electricity. As the trial court found, "CPP has the flexibility to increase or reduce its electrical supply through its various contracts and commitments" and "has the ability to sell [any] excess power to [the wholesale] markets." (CEI Appx. 36 (Finding of Fact No. 7).)

(CEI's Merit Brief at 2). CEI's explanation of the liquidity of the modern wholesale electricity markets operated by the regional transmission organizations also points to the ability of municipal utilities "to easily buy and dispose of electricity in real time. . . ." by accessing the transmission grid and wholesale markets. (CEI's Merit Brief at 8). CEI further notes "CPP can always adjust the total amount of electricity it receives, either by taking less *or by returning any excess it somehow ends up with*." (Emphasis added.) (CEI's Merit Brief at 15). While CEI does not refer to that "excess power" as a "surplus," the existence of a need to sell or return or dispose of excess power proves the existence of the surplus. Indeed, one of the contracts that CEI quotes in its brief explicitly discusses what may happen if the City has a "surplus." (CEI's Merit Brief at 14 (quoting contract language "If at any time [CPP] has capacity and/or energy in excess of its needs, it may request that AMP sell . . . . and AMP shall use commercially reasonable efforts . . . to attempt to sell such surplus")). The absence of a surplus in modern utility markets for energy is a fallacy – and one contradicted even by CEI's own Merit Brief – CEI just wants the City to sell the surplus back to the supplier or wholesale market rather than to customers in the retail market. However, the Ohio Constitution does not draw that distinction. Additionally, under CEI's flawed theory, if there is no surplus, how can the City sell the surplus in the wholesale market?

Further, it is not always true the surplus can be sold into the PJM market. For example, as discussed previously, CEI completely ignores the fact that CPP has internal generation resources that are considered to be behind the meter resources. This internal generation is not in the PJM market, is not under PJM's control, and may not be sold into PJM's market; the surplus of which cannot simply be sold into the wholesale energy market as CEI asserts. (Trial Dkt. 96 (4/15/19), Exh. A, Exh. 1 (Bentine Expert Report) at 24).

As discussed above, CEI, in its arguments, focuses exclusively on one product, energy (kWhs), and ignores completely the other products and services that the City provides and is required to provide (*e.g.*, capacity (kWs) and reserve margin). PJM requires utilities to have a capacity reserve margin, which means that utilities (including those run by municipalities) must purchase more generation capacity than is needed within the municipality. In the regional market at issue here, PJM currently requires an energy reserve margin of approximately 13 to 15 percent. (Trial Dkt. 96 (4/15/19), Exh. A (Affidavit of John Bentine) at ¶ 12). The City (because CPP is a load-serving entity) also has to show that CPP has sufficient capacity (kW) resources (not just energy (kWhs)) to serve its customers at peak load plus a reserve margin. (*Id*. at ¶ 31; *see also* Trial Dkt. 96 (4/15/19), Exh. A, Exh. 1 at 27-28). As a result, while the "modern market" may provide some flexibility as to energy sales (kWhs), it does not and cannot eliminate the occurrence of surplus capacity (kWs). That surplus capacity is relevant because, as explained in the unrefuted affidavit of Mr. Bentine, and his corresponding expert report, the City provides bundled distribution, transmission, and generation services, including capacity/demand (kilowatts or kW) and energy (kilowatt hours or kWh), to all of its customers. (Trial Dkt. 96 (4/15/19), Exh. A at ¶ 10; *see also* Trial Dkt. 96 (4/15/19), Exh. A, Exh. 1 at 8, 23-25). Therefore, municipalities must generate some surplus capacity and typically generate surplus energy in the course of serving their

residents to satisfy their full electricity requirements at any given point in time, including at their peak load plus a reserve margin.

CEI's claims that PJM's wholesale electricity markets are efficient, simple, and free from risks to the operation of municipal electric systems is fiction. Similarly, CEI's claims that the City could or should rely solely on PJM's wholesale energy spot market or even the other PJM markets to prudently and cost-effectively meet its wholesale electricity requirements for itself and its customers is also fiction. As Mr. John Bentine explained in his expert report, recent filings and actions taken by PJM and the Federal Energy Regulatory Commission have highlighted flaws in PJM's capacity market that would make it imprudent for the City to solely rely on it, even assuming that the City could terminate its current contractual obligations. (Trial Dkt. 96 (4/15/19), Exh. A, Exh. 1 at 31).

C. To Avoid Any Surplus at All Costs, as CEI Advocates, Would Hinder Municipalities in Their Section 4 Duties to Supply Residents in the Municipality And Would Create Excessive Risk and Costs

The Amicus briefs essentially boil down to the same argument that CEI makes: that sales of surplus to the retail market should be prohibited in the current market landscape. However, while the Amici Curae have lots of ideas for how the City ought to operate its electric system and dispose of its surplus electricity without selling to retail customers and without regard to whether the manner suggested is prudent, cost-effective, or in the best interest of the City or its customers, they do not provide any basis for judicial erasure of Article XVIII, Section 6, of the Ohio Constitution.

Article XVIII, Sections 4 and 6, of the Ohio Constitution together contemplate that municipalities may operate a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, and may also sell the surplus product outside of the

municipality with some limits. Nothing in the text of those sections indicates that municipalities should avoid acquiring a surplus to the exclusion of all other concerns, including concerns about pricing to residents and the energy security of its residents. Nothing in the text of those sections indicates that municipalities should dispose of their surplus in a way that avoids competing with other utilities. To the contrary, even the intent of the framers, as articulated by CEI, contemplates that these sections intend to allow municipalities discretion to acquire and sell a surplus within constitutional limits and compete with other utilities, as long as doing so is primarily for the purpose of supplying themselves and their inhabitants.

Here, the City has a supply portfolio comprised of resources that provide reliable and competitively priced capacity and energy to its customers. (Trial Dkt. 96 (4/15/19), Exh. A, Exh. 1 (Bentine Expert Report) at 8). Its diverse mix of resources include new, state of the art coal-fired, natural gas-fueled, hydroelectric, bioenergy, solar, and wind generation. This portfolio also includes spot, medium, and long-term market purchases, and long-term obligations. These long-term commitments are cost-based and are not subject to significant market variations, in contrast with purchases from the PJM capacity and energy markets. The City has committed to these generation resources and generation projects in order to (i) secure long-term stable sources of power, (ii) explore local generation opportunities where transmission congestion costs are mostly avoided, (iii) mitigate the costs of meeting its resource adequacy obligations, and (iv) diversify its generation supply portfolio and increase its supply of renewable energy. Together, these various types and sources of supply also serve as a hedge against the volatility of the PJM capacity and energy markets. (Trial Dkt. 96 (4/15/19), Exh. A, Exh. 1, Attachment B (showing the significant volatility in PJM's capacity auctions for the period 2013-2022 in the ATSI Zone, which includes CPP as well as CEI)). The City's long-term purchases from the AMP contracted generation

resources have another advantage over market purchases: because the City's long-term, contracted generation resource purchases are cost-based and from generation assets with lives of 40-75 years or more, the City's cost of power out of those assets is projected to drop dramatically when the bonds which financed their construction are paid off (similar to a homeowner that pays off a mortgage but still lives in the home). This secures lower cost power for the City's current and future customers. As a result, the various types of purchases of electricity at issue here were reasonable and prudent purchases made in the interest of supplying the municipality and its residents, and the incidental surplus that resulted from the City's activities totaled a mere 3 percent[5] of all sales within the municipal boundaries.

CEI argues that the City continues to enter new transactions that give it access to more energy so it can serve more customers outside its boundaries, but, in fact, the percentage of sales outside of the municipal boundaries decreased from 3.29 percent in 2015 to 3.04 percent in the first half of 2018. (Appellate Dkt. 12 (7/25/19) (Answer Brief) at 12 (summarizing data from Trial Dkt. 59 (10/26/18), Exh. B at Rog. No. 11)). Furthermore, it is undisputed that the purchase focused on by CEI – the purchase of Brooklyn Solar project's output – will provide renewable power to buildings owned by Cuyahoga County located within the City's municipal boundaries. (CEI Appx. at 009 at n.1 ("As specified in these agreements, the power the city supplied to the county-owned buildings in Cleveland was to come from the output of the Brooklyn solar project. . . .")). None of the renewable generation from that solar project is being sold extraterritorially. As such, CEI's implication that the City purchased surplus electricity from the Brooklyn Solar project to serve the city of Brooklyn is simply not true. (CEI Appx. at 009 at n.1 (recognizing that

[5] Indeed, at 3 percent external sales, the City would make a poor *de facto* broker of extra-municipal energy if that was its true goal and purpose.

although CEI devoted a considerable amount of time in its Brief to the Brooklyn Solar Project that "is not at issue in this case")).

D. CEI's Propositions of Law Nos. 1 and 2 Seek to Eliminate Constitutionally Permissible Competition

It would have been simple for the framers of the Ohio Constitution to prohibit municipalities from competing for customers outside their boundaries. They did not. In fact, they gave municipalities the explicit right to compete for customers outside their boundaries so long as they followed constitutional limitations. As a result, most of Ohio's municipal electric systems provided, and continue to provide, extraterritorial service and have served those customers, along with other municipally-owned facilities such as water and wastewater facilities, for decades. Any competitive losses or gains to CEI through the years have been recognized by the financial rating agencies and their investors, and the regulatory agencies' allowed rates of return should reflect any alleged risks. CEI's rates contain a rate of return that assumes competition with municipalities. To the extent that there is anything unfair in the competition, it results from legislative and administrative decisions relating to that competition and not from anything the City is doing.

Moreover, competition often begets choice, and consumers who switch providers almost always do so for better pricing, better service, or both. Competition benefits the public and helps to place downward pressure on rates for CEI's and the City's customers. (Trial Dkt. 96 (4/15/19), Exh. A (Affidavit of John Bentine) at ¶ 38). If an extraterritorial customer does not get satisfactory pricing or service, that customer can switch back. Customers should not be deprived of this choice where the Ohio Constitution permits it.

E. CEI's Proposition of Law No. 3 Invents a New, No-Other-Purpose Restriction on Purchases that is Not Found in the Ohio Constitution or Cases Interpreting It

CEI's Proposition of Law No. 3 seeks to place restrictions on the purchases a municipal

utility may make – specifically, it prohibits the purchase of any amount of electricity for any purpose other than supplying the electricity to itself or its inhabitants when there is a resulting excess sold outside of the municipality. The language in this proposition of law is noticeably absent from Article XVIII, Sections 4 and 6, of the Ohio Constitution. Neither is it found in *Toledo Edison v. City of Bryan*, 90 Ohio St.3d 288 (2000). To the contrary, *Toledo Edison* allowed for the purchases of electricity, but excluded one purpose: the purchase of electricity "solely to create an artificial surplus for the purpose of selling the electricity to an entity not within the municipality's geographic boundaries." It did not exclude any purposes except that one purpose. Rather than basing this proposition of law on the language of the Constitution or on *Toledo Edison*, CEI primarily relies on a faulty interpretation of a case that is not relevant here.

1. CEI Misrepresents the Central Holding of *Britt*

In supporting its Proposition of Law No. 3, CEI primarily relies on a mistaken reading of the decision in *Britt*. Specifically, CEI omits the key issue of *Britt* from its analysis, and tries to contort its language to create a new reading of the case. CEI asserts that *Britt* prohibits municipal utilities from selling surplus electricity; in reality, *Britt* expressly acknowledges a municipal utility's Constitutional authority to do so.

Unlike the case below, *Britt* did not involve a municipal utility's right to sell surplus utility service outside the municipality's boundaries. In *Britt*, the city of Columbus sought to use eminent domain power to appropriate unincorporated land outside of city limits in order to extend a sewer line through the unincorporated areas to the village of Dublin. 38 Ohio St.2d 1, 2, 309 N.E.2d 412 (1974). Columbus sought to build this sewer line for the sole purpose of selling excess sewage services to noninhabitants of the city, with the entire project providing no service to inhabitants. (*Id.*).

The *Britt* Court noted that Article XVIII, Section 4, of the Ohio Constitution, and related decisions, granted municipalities the authority to exercise eminent domain power within and without the municipality for the purposes of "supplying to the municipality or its inhabitants the service or product of any such utility." (*Id*. at 8 (citing *Blue Ash v. Cincinnati*, 173 Ohio St. 345, 182 N.E.2d 557 (1962))). Columbus argued that the express authorization, contained within Article XVIII, Section 6, for a municipality to sell surplus utility products and services to nonresidents, read in conjunction with the authority to exercise eminent domain power in order to supply utility services to the municipality, also created an implied authorization to exercise eminent domain power in order to supply utility services to nonresidents. *Britt*, 38 Ohio St.2d at 9-10. The Court found that since no such express provision existed, there must be a "compelling necessity" for the municipality to exercise this implied eminent domain power, and that no such compelling necessity existed in that case. (*Id.).*

CEI makes the mistaken argument that *Britt* applies to the case at bar by falsely suggesting that a municipal utility's right to sell excess products and services to nonresidents is not an "implied municipal-utility [power]." (CEI's Merit Brief at 34). To make this incredulous argument, CEI merely ignores the fact that Article XVIII, Section 6, of the Ohio Constitution expressly grants that exact power to municipal utilities. Ohio Constitution, Art. XVIII, § 6 ("Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, *may also sell and deliver to others* any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per cent of the total service or product supplied by such utility within the municipality, provided that such fifty per cent limitation shall not apply to the sale of water or sewage services." (Emphasis added.). Although *Britt* does require a "compelling necessity" for

an implied power of a municipal utility, the right to sell excess products and services to nonresidents is an express power enshrined in the Ohio Constitution.

Britt simply does not stand for what CEI claims it does. *Britt* applies to implied powers, whereas Article XVIII, Section 6, of the Ohio Constitution grants express powers to municipal utilities to sell surplus products and services. Furthermore, as discussed in the sections above, the City did not violate the express provisions of Sections 4 and 6 as interpreted by this Court.

2. Ohio Law Already Puts Reasonable Limits on Competition

CEI and its Amici also argue that if the Court does not overturn the Eighth District, then destructive competition will result. (*See* CEI's Merit Brief at 39; Brief of Amici Curiae Ohio Power Company, Duke Energy Ohio, Inc., and the Dayton Power and Light Co. at 3, 10; Brief of Amici Curiae Buckeye Power, Inc. and Ohio Rural Electric Cooperatives, Inc. at 25-28.) This predicted tidal wave of unfettered and unfair competition can be disproved by the fact that CEI's Proposition of Law No. 3 is not and has never been the law, and yet CEI's (and other IOUs and cooperatives) doomsday predictions have not come to pass. The reason for this is simple: Ohio law, without CEI's requests for additional and unconstitutional restrictions, already places reasonable limitations on the ability of municipal utilities to compete in the statewide marketplace. In fact, as noted previously, the City is only selling approximately 3 percent of what it is selling within the municipal boundaries to customers outside the City's boundaries.

CEI argues that "if the Eighth District's 'other purposes' test is allowed to stand, nothing will stop municipal utilities from pursuing the ever-greater 'economies of scale.'" (*Id.)* This is patently untrue. The express terms of Article XVIII, Section 6, of the Ohio Constitution require that the amount of service or product sold by a municipal utility outside of the municipality not exceed an amount equal to 50 percent of the amount of total service or product sold within the

municipality. Thus, from a simple mathematical perspective, no municipal utility could ever sell more than a third of its total supply outside the municipality.[6]

Additionally, the Section 6 "fifty per cent" rule turns on the total utility service or product provided by the municipality, not customer count. *See, e.g.*, *State ex rel. Wilson v. Hance*, 169 Ohio St. 457, 642, 159 N.E.2d 741 (1959) ("the city did deliver more than 50 per cent of the kilowatt hours delivered inside the city to consumers located outside of the city limits"). Thus, even if the municipal utility selectively targets "energy intensive customers" as CEI suggests, the municipal utility still will be limited to selling any surplus product in an amount not to exceed 50 percent of the total utility service or product supplied within the municipal's boundaries.

Finally, the arguments about the City's competitive advantages may be refuted as a factual matter by the fact that the City only supplies about 35 percent of customers within the municipal limits of the City itself. Whereas, CEI is serving the remaining 65 percent of the customers. If anyone has an unfair competitive advantage, it is clearly CEI. CEI has not articulated any compelling concerns about competition. Furthermore, were there such concerns, they would not justify inventing a new no-other-purpose restriction on purchases that is not embedded in the plain language of the Ohio Constitution or the cases interpreting it. Accordingly, CEI's Proposition of Law No. 3 should be rejected.

[6] Assuming that a utility sells two units of service inside the municipality, under Article 6, it could only provide 50 percent of that (one unit) outside the municipality. Thus, at most, one out of three units would come from outside the municipality.

IV. ARGUMENTS IN SUPPORT OF THE CITY'S PROPOSITION OF LAW

Proposition of Law No. 1: A Municipal Corporation Has The Right To Sell Electricity To Extraterritorial Customers So Long As The Amount Sold To Extraterritorial Customers Does Not Exceed Fifty Percent Of The Total Electricity Consumed Within The Municipal Corporation's Limits, And So Long As The Municipal Corporation Does Not Purchase Electricity Solely For The Purposes Of Reselling The Entire Amount Of That Electricity Extraterritorially.

The Eighth District erred by improperly extending the holding of *Toledo Edison* beyond the unique facts of that case, thereby impairing the Constitutional authorization for a municipal utility to lawfully sell surplus utility service or product. The Ohio Constitution grants municipal utilities broad authority to sell excess products and services, subject to a few reasonable restrictions. More specifically, Article XVIII, Sections 4 and 6, of the Ohio Constitution authorize municipalities to operate public utilities that supply the municipality or its inhabitants and limit the amount of sales that may be made outside the municipality's boundaries:

> (4) Any municipality may . . . operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. . . .
>
> * * *
>
> (6) Any municipality, owning or operating a public utility for the purpose of supplying the service or product thereof to the municipality or its inhabitants, may also sell and deliver to others any transportation service of such utility and the surplus product of any other utility in an amount not exceeding in either case fifty per cent of the total service or product supplied by such utility within the municipality . . . .

(Ohio Const., Art. XVIII, §§ 4 and 6). As discussed above, Article XVIII, Sections 4 and 6, of the Ohio Constitution, permit municipalities to have and sell surplus product. (*See* Part III.A.1. above). The text of these provisions only limits such extraterritorial sales of surplus insofar as municipalities may not exceed 50 percent of the service or product sold within the municipality's boundaries. (*Id.*).

In *Toledo Edison,* the Court created a very narrow exception to the broad Constitutional authorization to allow municipal utilities to sell excess service or products based on a particular set of facts. Those facts are simply not applicable to the present case. In *Toledo Edison*, a group of four municipalities contracted to supply electricity to a large industrial consumer, located outside of the municipalities. 90 Ohio St.3d at 289. However, the four municipalities could not fulfill their supply obligation to the customer with their existing electricity supply. (*Id*.). Instead, the municipalities entered into a new supply contract collectively for the sole purpose of acquiring the electricity necessary to fulfill its contractual obligations to the extraterritorial customer. (*Id*.).

The Court held that the municipalities lacked Constitutional authorization to collectively purchase electricity for the sole purpose of reselling it to the one customer since "Sections 4 and 6 only allow a municipality to purchase electricity primarily for the purpose of supplying its residents and reselling only surplus electricity from that purchase." (*Id*. at 292). This, the Court held, "precludes a municipality from purchasing electricity solely for the purpose of reselling the entire amount of the purchased electricity to an entity outside the municipality's geographic limits." (*Id*. at 291). In *Toledo Edison*, the municipalities did not have the surplus they needed to supply the entity, until they purchased the additional "electricity solely to create an artificial surplus for the purpose of selling the electricity to an entity not within the municipality's geographic boundaries." (*Id*. at 293). When the court subsequently denied a motion for reconsideration of its holding in *Toledo Edison*, Justice Pfeifer indicated that, while he joined the majority in *Toledo Edison*, he thought the reasoning should be more clearly restricted to the facts, because the facts in that case involved a pooling of surpluses to create a unique "piling on" arrangement. *Toledo Edison Co. v. Bryan*, 91 Ohio St.3d 1233, 742 N.E.2d 655 (2001) (Pfeifer, J., concurring). He noted that he considered everything in the opinion that addressed issues beyond the immediate

issues presented in that case to be dicta, and he confirmed his belief "that Section 6, Article XVIII does grant municipalities the right to resell outside their limits electricity purchased purposely for resale *and that that section also tempers that right by capping the resale at fifty percent of the total service provided within the municipality*." (Emphasis added.) (*Id.).* This together with the language of the underlying decision make it clear that the Court did not intend to upend the Constitutional framework regarding the sale of surpluses.

As a result, the exception created by the Court in *Toledo Edison* applies only when a municipal utility purchases electricity solely and specifically for resale of the entire purchased amount to a customer outside the municipal's boundaries. *See* 90 Ohio St.3d at 292 ("Sections 4 and 6 only allow a municipality to purchase electricity primarily for the purpose of supplying its residents and reselling" the surplus.). The trial court in this case correctly applied this rule, finding "that the purchase[s]…are not for the sole purpose of providing electricity to" customers outside of the municipality. (Emphasis sic.) (CEI Appx. at 042). At the trial level, the City provided uncontroverted evidence "that the [City] sells surplus electricity to customers outside of municipal limits at approximately 3%, well below the 50% limitation set by the Constitution, and that the [City] does not purchase electricity 'solely for the purpose of reselling the entire amount of the purchased electricity to an entity outside the municipality's geographic limits.'" (CEI Appx. at 045). Since CEI failed to offer any contrary evidence to these points, the trial court found that there were no remaining "relevant factual allegations that [were] in conflict" and granted the City's motion for summary judgment. (CEI Appx. at 045-047).

In granting summary judgment, the trial court acknowledged CEI's arguments about the changed nature of the electric market, but firmly stated that such policy considerations cannot override plain and unambiguous Constitutional law. "It is not the role of the trial court at this level

to change the law, particularly one created in the Ohio Constitution. The Court is not in a position to rule on the validity or irrelevance of the 50% limitation imposed in Ohio Constitution….[and] will restrict its decision to the actual facts in this case without attempting to change public policy as to the constitutional limitation." (CEI Appx. at 041-042).

Furthermore, even in light of the changed nature of the electric market, the trial court did not determine that the City was acting as a broker in selling its surplus. Although CEI continues to claim the City is acting as a "broker," the word "broker" is a defined term of art in the energy industry, and specifically denotes that a broker is a person certified by the commission, who assumes "the contractual and legal responsibility for the sale and/or arrangement for the supply of retail electric generation service to a retail customer in this state *without taking title to the electric power supplied*." (Emphasis added.) *See* Ohio Adm. Code 4901:1-21-01(CC) and (DD). Here, the City gains title to its power supply and retains that title until delivery to the customer. (Trial Dkt. 96 (4/15/19), Exh. A (Affidavit of John Bentine) at ¶¶13-16). The City is also not acting as a *de facto* broker in that it is not participating in the direct resale of purchased electricity to any entity outside the municipality as was the case in *Toledo Edison*. (*Id.*). As a result, the trial court correctly determined that the City's actions did not violate the Constitution.

CEI misreads *Toledo Edison*, and erroneously argues that when the Court said "[t]his interpretation necessarily precludes a municipality from purchasing electricity solely for the purpose of reselling the entire amount of the purchased electricity," it really means this interpretation necessarily precludes a municipality from purchasing electricity solely for the purpose of reselling *any electricity* arising from an artificial surplus. (Compare *Toledo Edison*, 90 Ohio St.3d at 292, with CEI's Merit Brief at 33 ("A municipal utility violates Article XVIII, Sections 4 and 6 if it buys any amount of electricity for a purpose other than supplying that

electricity to itself….")).

CEI also dedicates much of its brief to the concept of an "artificial surplus." (*See* CEI's Merit Brief at 24-30). CEI falsely claims that the City is able to purchase its entire electricity requirements (energy and capacity) in real time on PJM's energy spot market, and argues that unless the City avoids "purchasing every kilowatt" of its energy surplus, then the City actually has an "artificial surplus." (*Id*. at 25-26). Additionally, CEI posits that since some long-term contracts are for an amount of electricity that is less than the amount the City serves to customers outside its boundaries, those contracts are by definition an "artificial surplus." (*Id*. at 28). CEI then concludes that any amount, no matter how small, purchased by the City is by definition an "artificial surplus," and that *Toledo Edison* prohibits any sale of such "artificial surplus" to customers outside the municipal boundaries.

Although CEI ignores the operational portfolio approach taken by the City wherein it has a diversified energy mix, with laddered contracts, necessary to satisfy all of its customers' electricity requirements (energy and capacity) at peak load plus a reserve margin at any given point in time, it is unclear where CEI came up with this supposed rule, because it certainly does not appear in *Toledo Edison*. The *Toledo Edison* Court mentioned the term "artificial surplus" only once, saying: "This prohibition includes a de facto brokering of electricity, *i.e.*, where a municipality purchases electricity solely to create an artificial surplus for the purpose of selling the electricity to an entity not within the municipality's geographic boundaries." 90 Ohio St.3d at 293. The *Toledo Edison* Court did not define artificial surplus in the expansive manner CEI does—in fact, it did not define the term at all. Nor did the Court say that a municipal utility lacked authority to sell any artificial surplus. The Court instead stated that the Constitution allows resale when a municipal utility purchases electricity primarily—but not necessarily solely—for its own

use, but forbids resale when a municipal utility purchases electricity *solely* for reselling the *entire* amount:

> Read *in pari materia*, Sections 4 and 6 only allow a municipality to purchase electricity primarily for the purpose of supplying its residents and reselling only surplus electricity from that purchase to entities outside the municipality. This interpretation necessarily precludes a municipality from purchasing electricity solely for the purpose of reselling the entire amount of the purchased electricity to an entity outside the municipality's geographic limits.

Toledo Edison, 90 Ohio St.3d at 292. Moreover, neither the Ohio Constitution nor any other case law cited by CEI provides any further clarity as to the meaning or restriction of a supposed "artificial surplus." CEI merely takes one oblique reference and attempts to build an entire mythical constitutional doctrine around it. This Court may not rewrite the Constitution or the *Toledo Edison* opinion on the grounds of CEI's self-serving, circular, and unsupported arguments.

Despite the trial court's correct interpretation of *Toledo Edison*, the Eighth District mistakenly expanded the case's reach beyond its original, narrow scope. Unlike the trial court and the *Toledo Edison* Court, the Eighth District did not consider whether or not the entire purchase was solely for resale outside of the municipality, it only considered whether some of the purchase was solely for resale outside of the municipality. According to the Eighth District, "a municipality violates the Ohio Constitution if it purposely purchases more electricity than it needs for its inhabitants 'solely' so that it can resell electricity to customers outside its municipal boundaries." (CEI Appx. at 026).

This misstatement of the law, while subtle, has potential to negatively impact municipal utilities. By looking at any portion of any purchases rather than by looking at a given transaction in its totality, the Eighth District takes a piecemeal approach that will ignore a number of reasonable considerations that go into certain transactions because the focus will only be on the amounts of the purchases that are ultimately part of a surplus. This may entail courts finding that

certain transactions were for a valid purpose but an invalid amount. Ultimately, the Eighth District's approach would have the effect of second guessing the business decisions of the municipal utilities as to how much to purchase in a given contract at any given time rather than the role the Court took in *Toledo Edison*, in which the Court was merely applying the law to a particular transaction. CEI has taken that exact approach in its Merit Brief in this case, second guessing the business decisions previously made by the City and adding its hind sight and self-serving, purposely incomplete analysis to opine on the purchases made by a competitor in an attempt to put the competitor out of business. (*See* CEI's Merit Brief at 28-29).

The Eighth District incorrectly expanded the reach of *Toledo Edison* to unlawfully restrict the City's Constitutional authority to sell its surplus product. In doing so, the Eighth District improperly expanded prior case law, and ignored important policy considerations. The Court should reverse this erroneous decision, and reinstate the trial court's grant of summary judgment in favor of the City.

V. CONCLUSION.

CEI's arguments do not change the undisputed, and indisputable, material facts that are dispositive of this case: (i) the City does *not* sell surplus electricity to customers outside of municipal limits in excess of the 50 percent limitation set by the Ohio Constitution; (ii) the City does *not* purchase electricity "*solely* for the purpose of reselling the entire amount of the purchased power to an entity outside of the City's geographic limits" as set forth in *Toledo Edison*. As such, on this basis alone, this Court should reject CEI's appeal, overrule the Eighth District's Decision, and reinstate the summary judgment entry by the Cuyahoga County Court of Common Pleas in favor of the City.

Moreover, even under the Eighth District's expansive reading of this Court's ruling in *Toledo Edison* that the City is prohibited from purchasing electricity *solely* for the purposing of reselling *any* of it outside of municipal limits, the City is still entitled to judgment as a matter of law. There simply is no record evidence, and CEI has not identified any in this appeal, to establish that the City purchased excess electricity solely for the purpose of reselling it outside the city limits or that the City exceeded the 50 percent limitation of the Ohio Constitution. Not a single purchase contract referenced by CEI provides that those purchases are being made *solely* for resell beyond the municipal limits. The inquiry should end there. Notwithstanding the foregoing, the Eighth District's misinterpretation and misapplication of this Court's ruling in *Toledo Edison* should be soundly rejected by this Court. To allow it to stand would essentially render Article XVIII, Section 6, of the Ohio Constitution meaningless, impact the ability of the municipal utilities to operate efficiently and economically under Article XVIII, Section 4, of the Ohio Constitution, and add new limitations on municipal corporations, well beyond those articulated in the Ohio Constitution and by this Court. Simply stated, courts cannot re-write the Ohio Constitution in the manner sought by CEI.

Finally, assuming *arguendo* that this Court decides to affirm the Eighth District's Decision and remand this case to the trial court for a factual determination (which it should not do), then the entirety of the Eighth District's Decision should be affirmed. Because the City must have a portfolio that consists of enough resources to supply the maximum amount of electricity that any customer consumes at any given time under any circumstances plus a reserve margin, the Eighth District held that the City cannot be required to produce or purchase the precise amount – and only the precise amount – of electricity needed to satisfy the requirements of its municipal customers

and must be allowed to consider cost, risk mitigation, economies of scale, environmental impact and reliability in its purchasing decisions.

Accordingly, for the foregoing reasons, this Court should deny CEI's Appeal and grant the Appellees' Cross-Appeal, thereby reversing the Eighth District's Decision and reinstating judgment as a matter of law in favor of the City.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20th day of October, 2020, a true copy of the foregoing Merit Brief of Appellees/Cross-Appellants City of Cleveland, Cleveland Public Power, Cuyahoga County, and City of Brooklyn was served by regular U.S. mail, postage prepaid, and electronically upon the following:

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